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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 74

HENRY J. MILLS AND OSMOND J. LITOLFF,
PETITIONERS,

v.

STATE OF LOUISIANA

No. 75

AUGUST J. MILLS, SR.,
PETITIONER,

v.

STATE OF LOUISIANA,
RESPONDENT

On Writs of Certiorari to the Supreme Court of Louisiana

Brief for Respondent

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

May It Please Your Honors:

ARGUMENT

Respondent respectfully submits that your Honors' ruling in the case of *Milton Knapp v. Mitchell D. Schweitzer*, No. 189 (October Term, 1957), Vol. 78, No. 17, July 15, 1958, p. 1302, Supreme Court Re-

porter, 357 U.S. 371, 2 L.Ed. 1393, is applicable to the case at bar, since the record does not disclose any evidence of collaboration or cooperation between State and Federal officers in the investigation of petitioners' activities by the Grand Jury of Orleans Parish, State of Louisiana. Careful reading of the stipulations between the District Attorney of the Parish of Orleans and the petitioners (see pp. 46 and 53 of the printed record of the Supreme Court of the State of Louisiana) produces neither the fact nor the inference that the District Attorney for Orleans Parish was being used as an instrument of Federal prosecution or investigation.

The only cooperation and collaboration between the District Attorney for the Parish of Orleans and the United States Attorney for the Eastern District of Louisiana and the Internal Revenue Service of the United States was in reference *to members of the New Orleans Police Department* regarding public bribery and income tax evasion. The District Attorney further stipulated that he had held conferences with the United States Attorney for the Eastern District of Louisiana regarding public bribery and income tax evasion *on the part of certain members of the New Orleans Police Department.*

The record fails to disclose that the petitioners are members of the New Orleans Police Department, and, in fact, they are not. Had the District Attorney for Orleans Parish and the United States Attorney for the Eastern District of Louisiana or any member

of the Internal Revenue Service of the United States by actual design collaborated or combined to investigate or prosecute the defendants, the fairer inference is that this activity would have been detailed and specified in the stipulations referred to above. But since these officers of the State of Louisiana and the Federal government did discuss the possibility that certain members of the New Orleans Police Department may have engaged in public bribery and income tax evasion, the petitioners would have you infer that they were some how related to these conferences, since they too happened to be at the same period of time under investigation by the Grand Jury of Orleans Parish for public bribery. It is submitted that such an inference is entirely unsupported by any evidence in this record.

The waivers signed by the petitioners fixing by consent the period of limitation upon assessment of income tax and profits tax (re Mr. and Mrs. Osmond I. Litolff, see folio 71, print 70, and re Mr. and Mrs. Henry Mills, see folio 75, print 75) are dated *May 8, 1957* and were signed by the defendants on or about *May 13, 1957*, fully eight months prior to the date that petitioners refused to testify before the Grand Jury of Orleans Parish. It hardly can be argued that the securing of these waivers was part of any collaboration between the District Attorney for Orleans Parish and Federal authorities to obtain the investigation or prosecution of the petitioners.

The case at bar would stand on all fours with

Knapp v. Schweitzer, supra, were it not for the following divergence of facts:

In *Knapp v. Schweitzer*, supra, there is no evidence that the petitioner was under investigation by any Federal agency for a violation of the Federal criminal law at the time he refused to accept State immunity and to testify before State authorities. In the instant case, it is true that the petitioners were being investigated by the Internal Revenue Service of the United States for possible income tax evasion at the time they were called upon and refused to accept immunity and to testify for the Orleans Parish Grand Jury. However, respondents contend that this difference in facts is not material to your Honors' decision today.

It is respectfully suggested that the factual distinctions between the case before you today and those in *State v. Dominguez*, 82, So. 2d. 12, 228 La. 284, where the accused was actually under Federal indictment at the time compulsory testimony was elicited by the State officer, and the facts in *State v. Ford*, et als, 233 La. 992, 99 So. 2d. 320, where the defendants not only had not been indicted or charged by the Federal Courts, but had been informed that they were not under investigation by Federal authorities, may have offered the opportunity to the Supreme Court of Louisiana to grant the right to a defendant to refuse immunity and to maintain his right against self-incrimination when he is actually being investigated by Federal authorities for some Federal penal violation at the time

he is offered immunity in a State proceeding. But the Supreme Court of Louisiana did not see fit to make this extension and we respectfully submit that this Honorable Court lacks the jurisdiction to widen this horizon of individual protection.

Another question presented by the petitioners for review by your Honors is that the Supreme Court of Louisiana erred in failing to hold petitioners were legally justified in claiming their privilege against self-incrimination under the Fifth and Fourteenth Amendments of the Constitution of the United States when, after being granted immunity against future State prosecution, were called upon to testify before the Grand Jury of Orleans Parish.

The inescapable fact is the holding by this Honorable Court in *Knapp v. Schweitzer*, supra, must be applied to this case. Since the 5th. Amendment to the Constitution of the United States is protection only in the face of federal encroachment, it cannot afford sanctuary to the instant petitioners. Also, as the majority opinion of this Honorable Court noted in *Knapp v. Schweitzer*, supra, the claim that compulsory testimony in a state proceeding is an infringement upon the rights of petitioners accorded to them under the 14th. Amendment is without merit, this claim having been settled and disallowed in *Twining v. State of New Jersey*, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97.

There is no question that the defendants were in fact offered full immunity against future State pros-

ecution. Section 13 of Art. 19 of the Constitution of Louisiana reads as follows:

> Any person may be compelled to testify in any lawful proceeding against any one who may be charged with having committed the offense of bribery and shall not be permitted to withhold his testimony upon the ground that it may incriminate him or subject him to public infamy, but such testimony shall not afterwards be used against him in any judicial proceedings, except for perjury in giving such testimony."

The Supreme Court of Louisiana in the case of *State v. Rodriguez*, 82 So. 2d., 758; 219 La. 217, held that the grant of immunity contained in Section 13 of Article 19 of the Constitution of Louisiana was "plain, unambiguous, and subject to effective enforcement."

Nor can the petitioners avail themselves of the Ninth Amendment to the Constitution of the United States, *Knapp v. Schweitzer*, supra. The right of a citizen not to incriminate himself on either a State or Federal level is defined and expressed in Section 13 of Article 19 of the Constitution of Louisiana of 1921, and in the Fifth Amendment to the Constitution of the United States of America.

In conclusion, respondent should like to address a brief remark to the argument that the present state of the law puts a defendant between the horns of the dilemma to decide whether he should ignore immunity and thereby risk contempt on a State level or testify

and invite prosecution in a Federal proceeding. This dilemma was forged by the decisions in *Feldman v. United States*, 322 U.S., 487, 64 S. Ct. 1082, 88 L. Ed. 1408, and *Knapp v. Schweitzer*, supra.

CONCLUSION

Wherefore, respondent prays that the writs of certiorari, prohibition and mandamus heretofore issued be recalled and set aside and petitioners' petitions be dismissed at their costs and the judgment of the Supreme Court of Louisiana be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, M. E. Culligan, member of the bar of the Supreme Court of the United States, and one of the counsel for respondent herein, hereby certifies that on the ——— day of January, 1959, I served copies of the foregoing brief on the attorneys of counsel of record for petitioner herein by mailing copies in duly addressed envelopes with first class postage prepaid, as follows:

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